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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 844

CARL H. WILLIAMS, JOHN W. WILLIAMS, et al.,
Petitioners,

vs.

PACIFIC ROYALTY COMPANY, a corporation,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The unreported Opinions of the District Court are printed in Petitioners' Appendix (App. Pet.) at pp. 21-69. The Opinion rendered by the United States Court of Appeals for the Tenth Circuit is reported at 227 F. 2d 49. (See Appx. Pet., pp. 1-19.) The denial of the Petition for Rehearing by the United States Court of Appeals for the Tenth Circuit is unreported and is printed in Petitioners' Appendix at p. 73.

Jurisdiction

The asserted grounds for jurisdiction are set forth in the Petition.

Question Presented

Should an intemperate and baseless attack on the integrity of a Court of Appeals move this Court to review a decision resolving questions of fact and applying New Mexico law to settle title to real estate in a case of importance only to the litigants themselves.

Statement

I. *Genesis of the Action*

This case involves the title to mineral rights in 320 acres of land in Lea County, New Mexico.

In 1951, one of the attorneys signing the petition for certiorari, a resident of Dallas, Texas, learned of the existence of two alleged claims adverse to the title vested in this Respondent for more than 25 years. The information came from one Kenneth Swanson, also a lawyer and an oil operator. (R. 529.) The alleged claims were traced to the heirs of Lester L. Williams, who died in Texas in 1929 (R. 302), and the heirs of Gertrude Bates, who died in Michigan in 1925. (R. 443.) The claims of the Williams heirs and the Bates heirs were adverse to each other and mutually destructive. (Appx. Pet., p. 8.)

This attorney represented none of these persons and did not know them. (R. 536.) Nonetheless, he sought out the Williams heirs in San Angelo, Texas,[1] and the Bates heirs in Flint, Michigan, using the pretext that he was interested in purchasing their claims with the intention

[1] This was done by directing a long distance telephone operator to call all persons named Williams in San Angelo until she found one who admitted relationship to Lester L. Williams. (R. 543-544.)

of litigating them. (R. 529, 535.) As a result of the contacts so made, the attorney acquired the representation of both groups of heirs on a 50% contingent contract with the attorney to "bet the expenses" and the client not to pay any expense. (R. 539; Def. Ex. 6, R. 859.)[2] The attorney took a conveyance of his 50% interest immediately (R. 860) and thereupon had the two groups of heirs cross-convey half interests in the respective claims in an effort to eliminate the conflict of interest between the adverse claimants he was representing. (Pl. Ex. 5, R. 680, 683.)

Between 1926, when Respondent acquired title, and the date of trial, all witnesses having personal knowledge of the transactions on which the case is based had died. All records and correspondence of the trust company and the mortgage company which were intimately involved in the transaction had been destroyed. (Appx. Pet., p. 3.)[3]

This sudden interest in the title which Respondent had held for so many years is readily explainable. The value of the mineral rights increased from a maximum of $960.00 in 1926 to a value of approximately $1,000,000.00 at the time of trial. (Appx. Pet., p. 12.) In 1948, Respondent had sold an oil and gas lease for a consideration of $96,000.00 in cash, a payment out of oil of $320,000.00, and the usual one-eighth royalty interest. (Pl. Ex. 1, p. 52, R. 644.) Petitioners' attorney was not the first person to have been stimulated by these developments. In 1949, W. H. Gilmore of Midland, Texas, sought out the Bates heirs in Michigan and obtained a conveyance of any claim which they had to the property. (R. 357.) Gilmore then

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[2] Cf. Canons 28 and 42, The Canons of Professional Ethics of the American Bar Association.

[3] As the Court of Appeals said: "What actually happened is difficult to determine, and it must be obtained from somewhat fragmentary correspondence and documents. . . ." (Appx. Pet., p. 3.)

filed suit against this Respondent based on this conveyance. (R. 873 *et seq.*) Becoming convinced that he could not be successful, just prior to trial Gilmore permitted a decree to be entered dismissing his Complaint with prejudice and quieting title against him in the United States District Court. (R. 519, 918.)

In preparation for this action, the attorney representing Petitioners obtained a reconveyance from Gilmore to the Bates heirs. (Def. Ex. 4, R. 854.) He agreed to pay Gilmore and additional sum of $3,000.00 out of his portion of the proceeds of this case, should he be successful. (R. 368.) In addition, this attorney intends to pay over part of his recovery, if successful, to Mr. Kenneth Swanson, the attorney who told him about these title claims. (R. 535.)

The decision of the Court of Appeals was adverse to both the Williams heirs and the Bates heirs. Curiously, however, a writ of certiorari has been sought in this proceeding in behalf of the Williams heirs only, notwithstanding the cross-conveyances between the Bates and Williams heirs, which vested one-half of the claim of each group in the other group. (Pl. Ex. 5, R. 680, 683.)

II. *The Facts*

In 1919, Lester L. Williams, ancestor of Petitioners herein, obtained a patent to a homestead entry embracing the land involved in this case. (Pl. Ex. 1, R. 589.) He subsequently mortgaged the property for $900.00 to the F. B. Collins Investment Co. (Pl. Ex. 21, p. 17, R. 594), which in turn assigned the mortgage to Gertrude A. Bates. (Pl. Ex. 21, p. 20, R. 597.)

In 1920, Mr. Williams sold the land to William C. Stoneman (Pl. Ex. 21, p. 21, R. 598), taking back a mortgage for a portion of the purchase price. (Pl. Ex. 21, p. 22, R. 600.) Williams then moved to Texas. (R. 308.) Stone-

man subsequently became delinquent, and Williams took back the land in satisfaction of the mortgage (Pl. Ex. 21, pp. 24-25, R. 603-604) but never returned to New Mexico. (R. 308.)

Subsequently, Williams became delinquent in his own mortgage payments; and in 1926 the mortgage was forwarded to the Union Mortgage Company of Dallas, Texas, for collection. (Pl. Ex. 10, R. 692.) There was a long standing arrangement between the forwarding agent and the Union Mortgage Company which allowed the latter to make and retain any profit it might realize through the handling of such mortgage securities in excess of the amount required to pay the principal and interest due to the mortgage holder (App. Pet., pp. 3-4.) Mr. J. E. Whitehead was the owner and President of Union Mortgage Company. He and his wife and children also owned a small family corporation, the Pacific Royalty Company, Respondent herein. (R. 173.) The evidence indicates that Mr. Whitehead was also a lawyer but devoted substantially all of his time to Union Mortgage Company. (R. 181.)

Because Mr. Williams had left the land and had never returned, Union Mortgage Company was unsuccessful in its diligent effort to locate him. (Pl. Ex. 10, R. 700-703.) Consequently, suit to foreclose the mortgage was filed on October 20, 1926. (Pl. Ex. 21, p. 45, R. 610.) Later, Mr. Williams was located in San Angelo, Texas. There followed an exchange of correspondence between Whitehead and Williams. (Pl. Ex. 10, R. 711-719.) Petitioners rely on those portions of this correspondence which are still in existence as the basis for their case.

Petitioners would picture Whitehead as a "fraudulent agent" who "inveigled" Williams into conveying his land by means of "multiple misrepresentations." (Petition, p. 3.) Nothing could be further from the truth, and the Court of Appeals so held.

What really happened here has happened thousands of times. The mortgagor, unable to meet the payments, deeds over the land in satisfaction of the mortgage [4] to escape a deficiency judgment. At Whitehead's request, Williams executed the deed to a third person, one C. H. McKinney, correctly labeled by the Court below as a "strawman". (Pl. Ex. 1, p. 34, R. 632; Appx. Pet., p. 13). Williams requested information regarding McKinney's identity and asked if he would be given an opportunity to redeem. Whitehead told him McKinney was a relative of the owner of the mortgage and that Williams could redeem or repurchase the property if he attempted to do so before it was resold. (Pl. Ex. 10, R. 714-715.) While McKinney was not in fact a relative of the Bates family, this fact was, as the Court of Appeals held, immaterial to Williams. (Appx. Pet. p. 12.)

Williams executed the deed on December 11, 1926. Whitehead, in keeping with his agreement, dismissed the foreclosure action on December 18, 1926, the day after the deed was recorded. (Pl. Ex., 1, p. 34, R. 632, 634.) McKinney always understood that he held title for Whitehead (R. 217; Appx. Pet., pp. 13-14); and, in accordance with this understanding, Whitehead, on April 2, 1927, recorded a mineral deed from C. H. McKinney to Whitehead's Pacific Royalty Company, conveying the minerals underlying the Williams land. (Pl. Ex. 1, p. 45, R. 635.)

The land, without the minerals, was subsequently sold to one J. M. Denton by Union Mortgage Company. (R. 247.) The proceeds from the Denton sale were forwarded by Union Mortgage Company to satisfy the mortgage debt

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[4] As testified by one of the Petitioners, Williams' son: "All I remember about it was the business arose there, and I remember Father speaking of it, that he was busy and didn't have time to make the trip; and he just deeded the place over to McKinney to pay off the mortgage." (R. 309.)

(Pl. Ex. 10, R. 752), and the mortgage was released by the Bates estate on August 8, 1930. (Pl. Ex. 1, p. 32, R. 639.) Williams never attempted to repurchase the property; and, after his conveyance to McKinney, no liability was ever asserted against Williams or his heirs for the mortgage indebtedness.

Argument

In a diversity case involving no Federal question and no substantial issue of public importance the Court of Appeals for the Tenth Circuit has rendered a decision applying the New Mexico law relating to actionable fraud in a real estate transaction. This decision considered and rejected all of Petitioners' claims. Lacking any ground for invoking this Court's appellate review, Petitioners have attempted to substitute therefor an attack on the integrity of the Court of Appeals. Petitioners' various arguments are without merit for the following reasons:

I. *Petitioners' Attack on the Court of Appeals is Baseless*

Being unable to present any cogent reasons or legal points upon which to base their Petition for Certiorari, Petitioners have resorted to invective, vituperation and calumniation of the United States Court of Appeals for the Tenth Circuit. At p. 11 of the Petition it is stated:

> "Petitioners submit that the decision in this case reflects **such a departure from an acceptable appellant performance by a court of appeals** as to require exercise by this Court of its supervisory power.
>
> "Not only has the Court below made incorrect application of the law of New Mexico to those facts of the case **which it cared to note**, but, more important, it has shown itself to be **unaware of, or unwilling to treat**, two of the three alleged frauds that were brought to it for review." (Emphasis supplied.)

Further, at p. 12, Petitioners state:

> "Petitioners have been shorn of their district court judgment by a decision which shows on its face **either broad lack of familiarity with the case or an indifference to the issues which it posed.**" (Emphasis supplied.)

These statements are the more astounding upon examination of the decision rendered by the Court of Appeals.

Contrary to the impression Petitioners seek to create, the Court of Appeals gave exhaustive consideration to the issues in the case and all the contentions advanced. The case consisted of both an appeal and a cross-appeal which were briefed separately. Petitioners filed four briefs in the Court of Appeals totalling 284 pages. The record before the Court contained 931 printed pages. After considering this material, and after hearing oral argument, the Court of Appeals rendered a decision which encompasses 19 pages in Petitioners' Appendix. Thereafter, on motion by Petitioners for rehearing, the Court took the unusual step of requiring an answer brief and later permitted a reply thereto to be filed by Petitioners. Not only did the Court consider these three written briefs, it actually heard further oral argument—a rare occurrence on a petition for rehearing. The Court of Appeals then held the petition for rehearing under advisement for some three months before finally overruling it. Clearly, the Court gave most careful consideration to all of Petitioners' contentions before rejecting them. The exaggerated and irresponsible language of the Petition stands in stark contrast to the sound and reasoned Opinion of the Conrt of Appeals.

II. *The Decision Below is Clearly Correct*

The facts in this case can fairly lead to but one conclusion. The Court of Appeals after careful consideration has rendered a decision reaching that conclusion. This is a case in which the owner-mortgagor, having abandoned

his land, voluntarily deeded the property in satisfaction of the mortgage. He received the exact consideration bargained for—satisfaction of his debt. His heirs now seek to retain that consideration and to void the conveyance as well.

Petitioners, by taking out of context a single sentence of the Court's Opinion, seek to show that the Court considered only one of three grounds of fraud alleged in their Complaint. Their statements are refuted by the Opinion itself. Taken in context, it is apparent that the sentence from the Opinion (Appx. Pet., p. 11) quoted at p. 11 of the Petition ("This is the only fraud the plantiffs relied upon in their pleadings") is only part of a detailed consideration by the Court of Appeals of all grounds on which Petitioners relied. The Court of Appeals applied the New Mexico rule that "Fraud, to be actionable, must relate to a present or pre-existing fact. . . ." (Appx. Pet., p. 10.) The Court then correctly concluded that "the only false representation of an existing or pre-existing fact" (Appx. Pet., p. 11) was the representation as to the relationship of McKinney, concerning which the Court said (Appx. Pet., p. 12):

> "Concededly, the statement that McKinney was a relative of Mrs. Bates was false, but a fair analysis of the correspondence indicates that this was of no particular concern to Williams. It is evident that he was willing to convey the land to discharge his obligation under the note and mortgage. It is also quite evident that his inquiry about McKinney was to find out if he could obtain from him a full release of that obligation, including the interest coupons. The record is also clear that Williams received the consideration for which he bargained, that is, a complete release and satisfaction of his obligation under the note and mortgage. Consequently any promise of Whitehead for future action which induced him to execute the deed was performed. The foreclosure suit was dismissed."

III. *No Reason Exists for This Court to Exercise Its Supervisory Authority*

This Court sits to decide cases involving principles of public importance beyond the immediate effect on the private litigants.[5] Petitioners' statement of "Question Presented" (Petition, p. 2), as well as the arguments made in the Petition, recognize that this case involves nothing more than the application of New Mexico law to disputed facts. In petitioning this Court to exercise its "supervisory" authority, Petitioners have cited no valid reason for this Court to disturb the eminently correct decision rendered below. In a thoughtful and exhaustive opinion all of Petitioners' arguments were considered, and the Court of Appeals determined that Petitioners were not entitled to relief. Therefore, the contention that the decision of the Court below shows "on its face either broad lack of familiarity with the case or an indifference to the issues it posed" (Petition, p. 12) can be construed only as a savage attack on the integrity of that Court. Imputing gross negligence to the Court of Appeals, with no basis for the charge, does not make this an appropriate case for review by this Court. In *Layne and Bowler Corporation* v. *Western Well Works*, 261 U.S. 387, 393, the Court said:

> "... it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeals."

This language was quoted and relied upon in *National Labor Relations Board* v. *Pittsburgh Steamship Company*, 340

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[5] See, e.g., Address of Chief Justice Vinson before the American Bar Association, September 7, 1949, quoted in Stern and Gressman, *Supreme Court Practice* (1954), p. 107.

U. S. 498, and *Rice* v. *Sioux City Memorial Park*, 349 U. S. 70. The principle, of course, has been applied in countless instances.

A bald allegation of "indifference" directed against a lower Court by an unsuccessful litigant should not be enough to evoke the supervisory power of review of the Supreme Court of the United States. Something more is required: a question of real substance and of public importance (and at least a *scintilla* of evidence to support the serious charges against the Court of Appeals). The Petition for Certiorari in this case amounts to nothing more than a request for this Court to review a Court of Appeals' decision applying New Mexico law to disputed facts—a decision, moreover, which is amply supported by the authorities in the Opinion.

As Mr. Justice Jackson and Mr. Justice Frankfurter said in dissenting in *Stack* v. *Boyle*, 342 U.S. 1, 13:

> "And it ought to be noted that this Court will not exercise its certiorari power in individual cases except where they are typical of a problem so important and general as to deserve the attention of the supervisory power."

Petitioners have attempted to excite the curiosity of this Court by imputing gross negligence to the Court below. The only basis for this scurrilous attack is the fact that Petitioners lost in the Court below. Petitioners would provide a guise of importance for this case by imputing frivolity and indifference to the lower Court's actions, but they must do so in the face of an exhaustive and well considered Opinion—the product of an extended consideration of the case. The statement of issues and discussion of law in the Petition do not demonstrate that there has been any departure "from the accepted and usual course of judicial proceedings" (Revised Rules of the Supreme Court of

the United States, Rule 19) or that a problem is involved which is "so important and general as to deserve the attention of the supervisory power." (*Stack* v. *Boyle, supra*).

IV. *There is No Federal Question or Other Ground for Review*

There is no Federal question involved here, nor is any asserted by Petitioners. There are no conflicting decisions by Courts of Appeals which require resolution by this Court. The case involves New Mexico real estate and New Mexico law. When suit was brought, the principals and witnesses to the transactions involved had long since been dead and Respondent had been in quiet possession of the property for more than a quarter of a century. No public interest is involved; only the litigants themselves will be affected by the decision. There is, then, no basis for issuance of the writ of certiorari.

Conclusion

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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May 8, 1956.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 844

CARL H. WILLIAMS, ET AL.,
Petitioners,

—against—

PACIFIC ROYALTY COMPANY, a corporation,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Nothing in the brief in opposition detracts from petitioners' contention that important questions of New Mexico law have been decided by the court below in a way that conflicts with the law of that state.

1. In the petition (Pet. p. 7), it was pointed out that the court of appeals regarded the principal question in this case to be

> ". . . whether there was a material misrepresentation by Whitehead which induced the execution and the delivery of the deed and *which would constitute actionable fraud.*" (App. 9) (Emphasis added.)

The essential elements of actionable fraud, as declared by the court of appeals, are

> ". . . a false representation of a material fact, knowledge of its falsity when made, intent to deceive, and reliance thereon with resulting damages." (App. 10)

It is the gravamen of the petition that it was error under the law of New Mexico to impose those tests for actionable fraud in a proceeding to rescind a conveyance.

The brief in opposition does not meet that contention. It seeks to avoid it simply by ignoring it. That tactic of silence is readily explicable. Under the law of New Mexico, it is clear that a deed may be rescinded or canceled if there is any material misrepresentation inducing the conveyance. This is true irrespective of whether the misrepresentation was made with the knowledge of its falsity or with intent to deceive. The true rule has been repeatedly announced by the Supreme Court of New Mexico. That court has most recently said

> "We held in *Jones* v. *Freidman*, 57 N. M. 361, 258 P. 2d 1113, that irrespective of the good faith with which a misrepresentation of material fact is made, if it is justifiably relied on by one seeking rescission of the contract, such rescission should be allowed, and we reaffirm that holding." *Ham* v. *Hart*, 58 N. M. at 552, 273 P. 2d at 749.

The manifest error of the court of appeals in passing on this issue of New Mexico law in itself justifies summary reversal of the judgment below.

2. Both respondent and the court below have conceded that Williams was induced to convey his homestead by Whitehead's false representations. Whitehead misrepresented to Williams (1) that he would be afforded the right to redeem his home, (2) that he would be immediately and finally released from any obligation on his note and mortgage, and (3) that McKinney, the grantee of Williams, was a relative of the Bates, who would hold for that family in order to facilitate settlement of the Bates' Estate.

There can be no question but that the court of appeals failed to regard representations (1) and (2), above, as actionable frauds (App. 11). The court failed so to do be-

cause it apparently believed that those representations did not relate to present or pre-existing facts. As respondent states

> "The court . . . concluded that 'the only false representation of an existing or pre-existing fact' was the representation as to the relationship of McKinney . . ." (Br. in Opp., p. 9).

Refusal by the court of appeals to hold that all three of Whitehead's intentional misrepresentations dealt with present or pre-existing facts conflicts patently with applicable New Mexico law. Under the law of that state, a false representation of intention is a misrepresentation of "present" fact and is sufficient to sustain an action for fraud. See *Werner* v. *City of Albuquerque*, 55 N. M. 189, 229 P. 2d 688; *cf. Telman* v. *Galles*, 41 N. M. 56, 63 P. 2d 1049. The state of a man's mind is as much a matter of fact as is the state of his digestion.

The record clearly shows that Whitehead falsely represented his intentions to Williams, in order to induce that man to convey. Thus, Whitehead committed an intentional falsehood when he promised to deliver the Williams note and mortgage in exchange for a deed (Pl. Ex. 10, R. 188, 715). Whitehead made that promise to Williams upon a further misrepresentation that he then held the Williams note and mortgage* (Pl. Ex. 10, R. 188, 715). Since he made that

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*Clearly, Whitehead's misrepresentation that he had the Williams note and mortgage in hand is a misrepresentation of fact, irrespective of intention. This is so obvious as to render incredible the conclusion of the court of appeals that

> "The only false representation of an existing or pre-existing fact which Whitehead made to Williams was in his letter of November 18, 1926, wherein he wrote Williams that title was being taken in McKinney to prevent the title from becoming involved in the Bates Estate, and that McKinney was a relative who would hold it for the benefit of the estate." (App. 11)

Despite the obvious incongruity of the court's holding, respondent has urged, although without explanation, that the court of appeals was correct in reaching that conclusion. (Br. in Opp., p. 9)

latter representation when he actually held neither the note nor the mortgage (Pl. Ex. 10, R. 188, 745), it is clear that he did not intend to honor the promise he gave. Similarly when Whitehead promised Williams that he might redeem his homestead, he did not intend to keep that promise, inasmuch as it was given long after Whitehead had conveyed the Williams land to respondent (Pl. Ex. 10, R. 188, 714; Pl. Ex. 1, R. 158, 608-610).

CONCLUSION

The petition for writ of certiorari should be granted and the judgment of the court of appeals summarily reversed.

Respectfully submitted,

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May 16, 1956

Rec'd,